20

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1911

No. [redacted] 15

JAMES W. FINLEY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MARCH 19, 1909.

(21,543.)

(21,543.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 747.

JAMES W. FINLEY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 11, 1909.

1 In the Supreme Court of the United States.

JAMES W. FINLEY, Appellant and Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent & Defendant in Error.

Transcript of the Record.

Samuel T. Bush, Attorney for Appellant and Plaintiff in Error.
U. S. Webb, Attorney General, and Attorney for Respondent and Defendant in Error.

2 *Indictment.*

In the Superior Court of the County of Sacramento, the 10th Day of August, A. D. 1906.

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

J. W. FINLEY, Defendant.

J. W. Finley is accused by the Grand Jury of the County of Sacramento, by this indictment, of the crime of assault upon another person with a deadly weapon and with malice aforethought; said J. W. Finley being then and there a prisoner undergoing a life sentence in a State prison of the State of California, committed as follows:

The said J. W. Finley on the 29th day of December, A. D., 1904, at the said County of Sacramento, in the said State of California, and before the finding of this indictment, did then and there willfully, unlawfully, feloniously and of his malice aforethought, commit an assault upon the person of another, to wit: R. J. Murphy, a human being, with a certain deadly weapon, to wit: a long bladed, sharp pointed knife, then and there in his, the said J. W. Finley's hand had and held; that at said time and place of the commission of said assault, as aforesaid, the said J. W. Finley was then and there a prisoner confined in -nd undergoing a life sentence at the State prison at Folsom, in the County of Sacramento, State of California, said prison being a State prison of the State of California, and said assault having been committed within the said prison, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

A. M. SEYMOUR,
District Attorney of Sacramento County, in the State of California.

3 Endorsed: No. 4165. The People of the State of California against J. W. Finley, defendant. Indictment for as-

sault with a deadly weapon with malice aforethought, defendant being a prisoner undergoing a life sentence in a State Prison. A true Bill. Geo. M. Mott, Foreman.

Presented in the Superior Court of the County of Sacramento, in open Court, in the presence of the Grand Jury, by their Foreman, and filed as a record of said Court, this 10th day of August, A. D. 1905.

W. B. HAMILTON, *Clerk,*
By M. J. SULLIVAN,
Deputy Clerk.

A. M. SEYMOUR,
District Attorney.
S. T. BUSH,
Defendant's Attorney.

Names of witnesses examined before Grand Jury: W. H. Harris, R. J. Murphy, C. H. Jolly, C. L. Taylor.

Demurrer to Indictment.

(Title of Court and Cause.)

Now comes the defendant above named and demurs to the indictment heretofore filed in the above entitled action, on the following grounds, to wit:

I.

That the Grand Jury of Sacramento County, by which said indictment was found, had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of said Sacramento County:

1. Because the punishment prescribed for the commission of said offense, as charged in said indictment, is cruel and unusual and in violation of law.

2. Because all persons standing in the same class and in the same position, relatively, committing said offense, are not punished equally or alike.

4 3. Because the statute prescribing, promulgating and limiting said offense contemplates solely the amount of punishment inflicted for the commission of the prior offense in prescribing the increased punishment to be inflicted for the commission of the subsequent offense, instead of contemplating the nature or gravity of the prior offense in order to fix the amount of increased punishment for the commission of the subsequent offense.

4. Because by reason of the foregoing averments said statute prescribing said offense is unlawful, void and illegal.

SAMUEL T. BUSH,
Attorney for Defendant.

Dated September 16th, 1905.

Endorsed: No. 4165. Dept. No. 3. In the Superior Court of the County of Sacramento, State of California. People of the State of California, plaintiff, *vs.* J. W. Finley, defendant. Demurrer. Filed Nov. 11, 1905. W. B. Hamilton, Clerk, by M. J. Sullivan, Deputy. Samuel T. Bush, Attorney for Defendant, Rooms 21 and 22 Stoll Building, Sacramento, Cal. Due service of within demurrer admitted by copy this 23rd day of September, 1905. A. M. Seymour, Attorney for People.

5 *Verdict of Jury of Sacramento County.*

In the Superior Court of the State of California in and for the County of Sacramento.

(Title of Court and Cause.)

We, the jury in the above entitled cause, find that the defendant is a prisoner undergoing a sentence of life imprisonment in the State Prison at Folsom; that said defendant is guilty as charged in the indictment.

O. W. ERLEWINE, *Foreman.*

Judgment of Superior Court of Sacramento County.

In the Superior Court of the State of California in and for the County of Sacramento.

(Title of Court and Cause.)

Convicted of assault with a deadly weapon with malice aforethought, defendant being a prisoner undergoing a life sentence in a State prison.

WEDNESDAY, *December 27th, A. D.* 1905.

Present: Hon. E. C. Hart, Judge.

This being the day heretofore designated by the Court for rendering judgment against the defendant, J. W. Finley, upon the verdict of the jury heretofore rendered herein; and the said defendant now appearing personally in Court, attended by his counsel, Samuel T. Bush, and the District Attorney also appearing on behalf of the People; thereupon counsel for defendant made a motion in arrest of judgment, which motion was by the Court denied, to which ruling the defendant duly excepted; thereupon counsel for defendant made a motion for a new trial of said cause, which motion was by the Court denied, to which ruling the defendant duly excepted.

6 Whereupon, the Court now proceeds to pronounce judgment upon the defendant, J. W. Finley, and after informing him, the said J. W. Finley, of the indictment filed against him, and of the nature of the charge, of his plea of not guilty thereto, and of

his subsequent trial before a jury and conviction, and thereupon the said defendant was asked by the Court whether he had any legal cause to show why judgment should not be pronounced against him; and no cause being shown or appearing, the Court renders judgment as follows:

It is ordered and adjudged, that you, J. W. Finley, be taken hence to the County Jail of this County, and be there detained in close confinement until such time, within ten days, as the Sheriff of the County of Sacramento shall deliver you to the Warden of the State Prison at Folsom, State of California, where you will be detained in close confinement until such day as shall be designated in the warrant of execution of this judgment, and on the day so designated you will be, by the Warden, in some place within the walls of said State Prison at Folsom, hanged by the neck until you are dead.

Dated, December 27th, 1905.

E. C. HART,
Judge of the Superior Court.

Attest:
[SEAL.] W. B. HAMILTON, *Clerk.*
By M. J. SULLIVAN, *Deputy Clerk.*

7 *Notice of Appeal.*

In the Superior Court in and for the County of Sacramento, State of California.

(Title of Court and Cause.)

To A. M. Seymour, Esq., District Attorney of Sacramento County, State of California, and W. B. Hamilton, Esq., County Clerk of said County, and *ex officio* Clerk of the Superior Court of said County and State:

You, and each of you, will please take notice that the defendant above named, J. W. Finley, hereby appeals to the Supreme Court of the State of California, from the judgment duly given made and rendered against said J. W. Finley, in said action, on the 27th day of December, 1905, and from the order denying said defendant's motion for a new trial made and entered in said cause on said 27th day of December, 1905, and from the whole of said judgment and order.

SAMUEL T. BUSH,
Attorney for Defendant, J. W. Finley,
Rooms 473-474, Parrott Building, San Francisco.

Dated, this 1st day of February, 1906.

Endorsed: No. 4165. Dept. 3. In the Superior Court in and for the County of Sacramento, State of California. People, etc., plaintiff *vs.* J. W. Finley, defendant. Notice of Appeal. Filed Feb. 1, 1906. W. B. Hamilton, Clerk, by M. J. Sullivan, Deputy. Samuel

T. Bush, Attorney for Defendant, Rooms 473-474 Parrott Building, San Francisco, Cal. Due service of within notice of appeal admitted by copy this 1st day of February, 1906. A. M. Seymour, Attorney for plaintiff and District Attorney.

Endorsed: Filed February 1st, 1906. W. B. Hamilton, Clerk, by M. J. Sullivan Deputy Clerk.

8 *Assignment of Errors.*

In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent in Error.

The defendant and plaintiff in error files the following Assignment of Errors upon which he will rely and prosecute a Writ of Error in the above entitled cause:

That the Supreme Court of the State of California erred in holding and deciding

1.

That section 246 of the Penal Code of the State of California does not contr-vene and violate section 1 of the 14th Amendment to the Constitution of the United States.

2.

That the said Court erred in holding and deciding that said section 246 of said Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

3.

That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the same protection of the laws, which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

4.

That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence, and a convict undergoing a sentence for a period of years, which in all human probability
9 will exceed the term of natural life.

SAMUEL T. BUSH,
G. C. RINGOLSKY,
Attorneys for Defendant and Plaintiff in Error.

Endorsed: Crim. 1367, Original. In the Supreme Court of the United States. J. W. Finley, Defendant and Plaintiff in Error, *vs.* The People of the State of California, Plaintiff and Respondent in

Error. Assignment of Errors. Filed June 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and G. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

Order Allowing Writ.

Let a Writ of Error in the above entitled cause issue as prayed for in the Petition, the same to operate as a supersedeas according to the customs and laws of the United States, upon all matters in said Writ mentioned, the plaintiff in error to remain in the custody of the Warden of the State Prison of the State of California at Folsom in said State, and pending the final determination of said writ of error, the execution of said defendant is hereby stayed.

Dated June 9, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Crim. 1367, Original. In the Supreme Court of the State of California. The People of the State of California, Plaintiff and Respondent, *vs.* J. W. Finley, Defendant and Appellant. Petition for Writ of Error. Order Allowing Writ and Supersedeas. Filed June 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and G. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

10

Citation.

In the Supreme Court of the United States.

JAMES W. FINLEY, Appellant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent and Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the People of the State of California, and to the Hon. James M. Gillett, Governor of the State of California, and to the Hon. Ulysses S. Webb, Attorney General of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at the City of Washington on the 7th day of August, 1908, next, pursuant to an order allowing a writ of error entered in the Clerk's office of the Supreme Court of the State of California, in that certain action Numbered 1367, in which J. W. Finley is appellant and plaintiff in error, and you are the respondent and defendant in error, to show cause, if any there be, why the final judgment rendered against the said appellant and

plaintiff in error, as in the said order allowing a writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. W. H. Beatty, Chief Justice of the Supreme Court of the State of California this 2d day of July, 1908.

[SEAL.] W. H. BEATTY,
Chief Justice.

Due service of the foregoing citation and receipt of a copy thereof admitted this 6th day of July, 1908.

J. N. GILLETT,
Governor of the State of California.
U. S. WEBB,
Attorney General of the State of California.
H.

11 Endorsed: Original, Crim. 1367. Supreme Court United States. James W. Finley, Appellant and Plaintiff in Error, *vs.* The People of the State of California, Respondent and Defendant in Error. Citation. Filed July 18, 1908. F. L. Caughey, Clerk, by Erb, Deputy. Samuel T. Bush, G. C. Ringolsky, Attorneys for Appellant and Plaintiff in Error, 803-805 Claus Spreckels Bldg., San Francisco, California.

12 *Final Judgment of Supreme Court.*

In the Supreme Court of the State of California.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,
vs.
J. W. FINLEY, Defendant and Appellant.

FEB. 13, 1908.

The judgment and order appealed from are affirmed.

HENSHAW, *J.*

ANGELLOTTI, *J.*
SHAW, *J.*
SLOSS, *J.*
LORIGAN, *J.*
BEATTY, *C. J.*
McFARLAND, *J.*

13 *Clerk's Certificate.*

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing Indictment, Demurrer to Indictment, Verdict of the Jury of Sacramento County, Judgment of the Superior Court of Sacramento County, Notice of Appeal, Assignment of Errors, Order Allowing Writ of Error, Citation, and Final Judgment of the Supreme Court of the State of

California, are each and all a full true and correct copy of the same on file in the office of the Clerk of the Supreme Court of the State of California, and which, together with the Original Writ of Error, comprise the complete Transcript of the Record to be transmitted to the Clerk of the Supreme Court of the United States in the case of James W. Finley, Appellant and Plaintiff in Error *versus* the People of the State of California, Respondent and Defendant in Error.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court
of the State of California,
By I. ERB, *Deputy Clerk.*

14 Crim. No. 1367.

Bank.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,
v.
J. W. FINLEY, Defendant and Appellant.

The appellant while undergoing a life sentence in the state prison at Folsom was indicted under section 246 of the Penal Code, tried upon the indictment, found guilty and the death penalty imposed. From the judgment and from the order denying his motion for a new trial he prosecutes this appeal.

The section of the code defining his crime is in the following language: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

The principal contentions of the appellant, advanced in different forms, resolve themselves into two propositions, both going to the constitutionality and validity of section 246 of the Penal Code. The first of these propositions is that it denies to the defendant the equal protection of the law guaranteed by the XIVth amendment to the constitution of the United States. Second, that it contravenes the provisions of article I, section 11 of the constitution of this state declaring that all laws of a general nature should have a uniform operation.

As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed of general knowledge that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate pun-

15

ishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by "life termers," form a part of the history of our state. Indeed, it is known at times that prison officials have deemed it wise to clothe the "life termers" in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well recognized condition of affairs it seemed expedient to the legislature to meet the situation by the enactment of section 246 of the Penal Code.

It is upon the authority of the City of Pasadena *v.* Stimson, 91 Cal. 252, and the numerous cases of like import, declaring that class legislation must be based upon some natural, intrinsic, constitutional, reasonable distinction, or otherwise that it is in violation of section 11, of Article 1 of the constitution of this state, that the appellant argues against the validity of the code provision. In this regard his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The "life termers" as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good con-
16 duct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences, are graver in their nature and give evidence of more abandoned and malignant hearts, than do the crimes of those undergoing sentence for years. And, finally, if the legislature sought to make the law applicable to convicts other than "life termers," the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the "life termer," and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

Nor can it be said that the act in question is violative of the XIVth amendment of the constitution of the United States. This amendment means simply, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. (Bauman *v.* Lewis "(Missouri *v.* Lewis)," 101 U. S. 22, (25:299)). Paraphrasing the language of the Supreme Court of the United States in Moore *v.* Missouri, 159 U. S. 676, we cannot perceive that appellant was denied the equal protection of the laws, for every other person in like cases with him, and convicted as he has been, would be subjected to like punishment.

Defendant complains of the refusal of the court to give a requested instruction to the jury to the effect that they might render any one of four verdicts according to their conclusion from the evidence, viz: guilty as charged in the indictment, guilty of assault with a deadly weapon, guilty of simple assault and not guilty. There was no error in this action of the court. In view of the evidence as shown
17 by the record the defendant was either guilty as charged in the indictment, or not guilty at all, and the jury was charged that if the evidence did not satisfy them beyond a reasonable doubt that he was guilty of the offense charged, they must find him not guilty.

It is finally contended that the indictment is defective in failing to charge that the defendant was sentenced to life imprisonment in the state prison by a court of competent jurisdiction designating it. The indictment charged in the language of the code that the defendant was then and there a person confined in and undergoing a life sentence at the state prison. It was sufficiently specific to enable defendant to prepare his defense. It is plainly one of those crimes, which as to the matter in question, it is sufficient to charge in the language of the statute. (People *v.* O'Brien, 96 Cal. 174; People *v.* King, 126 Cal. 369.) Upon the trial the record of the commitment of the defendant to the state prison was offered and admitted in evidence over the objection of the defendant. This record was not only competent evidence, but the method adopted was the proper method of its presentation to the court. (People *v.* Williams, 39 South. 337.)

For these reasons the judgment and order appealed from are affirmed.

HENSHAW, *J.*

We concur:

ANGELLOTTI, *J.*
SHAW, *J.*
SLOSS, *J.*
LORIGAN, *J.*
BEATTY, *C. J.*
McFARLAND, *J.*

18 *Clerk's Certificate to Decision of Supreme Court.*

I, F. L. Caughey, do hereby certify that the foregoing decision rendered by the Supreme Court of the State of California, in the case of the People of the State of California, plaintiff and respondent *vs.* J. W. Finley, defendant and appellant, is a full, true and correct copy of said opinion on file in the Clerk's office of the Supreme Court of the State of California.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California,
By I. ERB, *Deputy Clerk.*

19 [Endorsed:] No. —. Dep't —. In the Supreme Court of the United States. James W. Finley, Plaintiff in Error, *vs.* The People of the State of California, Defendant in Error. Transcript of the Record. Samuel T. Bush, Attorney for Plaintiff in Error, Rooms 559-565 Monadnock Building, San Francisco.

20 In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment which is in the Supreme Court of the State of California, before you, or some of you, being the highest Court of law and equity of the said State in which a decision could be had in the said action, between J. W. Finley, defendant and plaintiff in error, and the People of the State of California, plaintiff and respondent in error, wherein was drawn in question the validity of a statute of said State of California on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision of said Supreme Court was in favor of such, its validity, a manifest error hath happened to the great damage of the said J. W. Finley, plaintiff in error, as by his petition, assignment of errors and the record herein appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the
21 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this Writ, so that you may have the same at Washington on the 7th day of August, 1908, next, in the said Supreme Court that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of June, 1908.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court,
Northern District of California,
By J. A. SCHAERTZER, *Deputy Clerk.*

Allowed, June 9th, 1908.
W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

Due service of the foregoing writ of error and receipt of a copy thereof admitted this 6th day of July, 1908.

J. N. GILLETT,
Governor of the State of California.

Due Receipt of a copy of the within is admitted this 10th day of July, 1908.

U. S. WEBB,
Attorney General,
By L. HERZOG.

22 [Endorsed:] Crim. 1367. Original. In the Supreme Court of the United States. J. W. Finley, Defendant and Plaintiff in Error, *vs.* The People of the State of California, Plaintiff and Respondent in Error. Writ of error. Filed Jun- 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and S. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

23 In the Supreme Court of the United States.

JAMES W. FINLEY, Appellant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent and Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the People of the State of California, and to the Hon. James M. Gillett, Governor of the State of California, and to the Hon. Ulysses S. Webb, Attorney General of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at the City of Washington on the 7th day of August, 1908, next pursuant to an order al-

lowing a writ of error entered in the Clerk's office of the Supreme Court of the State of California, in that certain action Numbered #1367 in which J. W. Finley is appellant and plaintiff in error, and you are the respondent and defendant in error, to show cause, if any there be, why the final judgment rendered against the said appellant and plaintiff in error, as in the said order allowing a writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. W. H. Beatty, Chief Justice of the Supreme Court of the State of California this 2nd day of July, 1908.

[Seal Supreme Court of California.]

W. H. BEATTY,
Chief Justice.

24 Due service of foregoing citation and receipt of a copy thereof admitted this 6th day of July 1908.

J. N. GILLETT.
Governor of the State of California.
U. S. WEBB,
Attorney General of the State of California.
H.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original Citation in Crim. No. 1367, James W. Finley, Appellant and Plaintiff in Error, *versus* The People of the State of California, Respondent and Def't in Error, as shown by the records of my office.

Witness my hand and the seal of the Court, this 3d day of August, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

25 [Endorsed:] Crim. 1367, Original. Supreme Court, United States. James W. Finley, Appellant and Plaintiff in Error, *vs.* The People of the State of California, Respondent and Defendant in Error. Citation. Filed Jul- 18, 1908. F. L. Caughey, Clerk, By Erb, Deputy. Samuel T. Bush, G. C. Ringolsky, Attorneys for Appellant and Plaintiff in Error, 803-805 Claus Spreckels Bldg., San Francisco, California.

26 In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent in Error.

Assignment of Errors.

The defendant and plaintiff in error files the following Assignment of Errors upon which he will rely and prosecute a Writ of Error in the above entitled cause:

That the Supreme Court of the State of California erred in holding and deciding

1.

That section 246 of the Penal Code of the State of California does not contravene and violate section 1 of the 14th Amendment of the Constitution of the United States.

2.

That the said Court erred in holding and deciding that said section 246 of said Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

3.

That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the same protection of the laws, which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

4.

27 That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence, and a convict undergoing a sentence for a period of years, which in all human probability will exceed the term of natural life.

SAMUEL T. BUSH,
G. C. RINGOLSKY,
Attorneys for Defendant and Plaintiff in Error.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original Assignment of Errors in Crim. 1367, James W. Finley, appellant and Plaintiff in Error *versus* The People of the State of California, Respondent and Defendant in Error as shown by the records of my office.

Witness my hand and the seal of the Court, this 3d day of August, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

28 [Endorsed:] Crim. 1367, Original. In the Supreme Court of the United States. J. W. Finley, Defendant and Plaintiff in Error, *vs.* The People of the State of California, Plaintiff and Respondent in Error. Assignment of Errors. Filed Jun- 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and G. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

29 In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Prayer for Reversal.

J. W. Finley, Plaintiff in Error, prays for a judgment of reversal by this Honorable Court of the final judgment rendered by the Supreme Court of the State of California, in the case of the People of the State of California, Plaintiff, *versus* J. W. Finley, defendant, as of record appears in this cause, and as a basis for this prayer for reversal, respectfully urges the grounds set forth in his Assignment of Errors, filed and of record herein.

SAMUEL T. BUSH,
Attorney for Plaintiff in Error.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original Prayer for Reversal in Crim. No. 1367, James W. Finley, Appellant and Plaintiff in Error, *versus* The People of the State of California, Respondent and Defendant in Error, as shown by the records of my office.

Witness my hand and the seal of the Court, this 3d day of August, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

30 [Endorsed:] No. Crim. 1367. Dept. —. In the Supreme Court of the United States. J. W. Finley, Plaintiff in Error, *vs.* The People of the State of California, Defendant in Error. Prayer for Reversal. Filed July 18, 1908. F. L. Caughey, Clerk, By I. Erb, Deputy. Samuel T. Bush, Attorney for Plaintiff in Error, 559-565 Monadnock Building, S. F.

Endorsed on cover: File No. 21,543. California supreme court. Term No. 747. James W. Finley, plaintiff in error, *vs.* The People of the State of California. Filed March 10th, 1909. File No. 21,543.

ABSTRACT.

Plaintiff in error was proceeded against under section 246 of the Penal Code of the State of California and, after conviction, sentenced to death. Upon appeal to the Supreme Court of the State the judgment was affirmed. Throughout it was contended that this section is inhibited by article XIV of the Federal Constitution. The decision was in favor of the validity of the statute and the cause, involving this sole contention, is regularly before this Court on writ of error to the Supreme Court of the State of California.

Transcript, p. 7;
People vs. *Finley*, 153 Cal. 59;
Sec. 709, U. S. Rev. Stats.;
Sec. 49, Code Civ. Proc.;
Gross vs. *U. S. Mortgage Co.*, 108 U. S. 427;
Philadelphia Fire Association vs. *New York*, 119 U. S. 110.

I. While the law with reference to classification within the constitutional meaning is well settled, the application thereof gives rise to question.

Yick Wo vs. *Hopkins*, 118 U. S. 356;
Barbier vs. *Connolly*, 113 U. S. 27;
Board of Education vs. *Alliance Assurance Co.*, 159 Fed. 994.

II. It is necessary to ascertain the reason and purpose of the statute to determine its validity.

a. The rapid and beneficent advance of penal reform necessitates the conclusion that no trivial reason prompted or should be held to have prompted the statute.

Boies, Science of Penology, 119.

b. The legislature did not base the statute upon the ground that life termers are more dangerous than other prisoners.

People vs. *Finley*, 153 Cal. 59, *contra*.

1. The term of imprisonment is determined by influences other than personal character.

Drahms, The Criminal, 364;
Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374.

2. Life termers are not desperate because of the loss of all hope of freedom, since the parole law of California supplies ample relief.

3. Permanent loss of civil rights as compared with a temporary loss thereof does not make the life termer more dangerous than his fellow convict.

c. A law predicated on length of term is unconstitutional.
Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374;

State vs. *Lewin*, 53 Kan. 679, 37 Pac. 168.

d. The only possible reason for the enactment of the statute is a seeming lack of adequate punishment for life termers.

III. The classification necessary to support a statute must be based upon REAL differences in the situation, condition and tendencies of things.

Ho Ah Kow vs. *Nunan*, 5 Sawyer 552;
Gulf etc. Ry. Co. v. *Ellis*, 165 U. S. 150;
Cotting vs. *Kansas City Stock Yards*, 183 U. S. 79;
Connolly vs. *Union Sewer Pipe Co.*, 184 U. S. 540;
Board of Education vs. *Alliance Assurance Co.*, 159 Fed 994;
State vs. *Loomis*, 115 Mo. 307, 22 S. W. 350;
State vs. *Miksicek*, 125 S. W. 506, Mo. 1910;
State vs. *Mitchell*, 97 Me. 66, 73;
State vs. *Julow*, 129 Mo. 163, 31 S. W. 781, at 783;
State vs. *Thomas*, 138 Mo. 95; 39 S. W. 481;
Murray vs. *Board of Commissioners*, 81 Minn. 359, 84 N. W. 103;
Nichols vs. *Walter*, 37 Minn 264, 33 N. W. 800;
People vs. *Van De Carr*, 86 N. Y. S. 644;
Jones vs. *C. R. Railway Co.*, 231 Ill. 302, 308;
State vs. *Wright*, 53 Ore. 344, 100 Pac. 296;
State vs. *Hammer*, 42 N. J. L. 435;
In re Van Horne, 74 N. J. E. 600, 70 Atl. 986;
Gillespie vs. *People*, 64 N. E. 533, Illinois;
Phipps vs. *Wis. Cent. Ry. Co.*, 133 Wis. 153, 143 N. W. 456;
Johnson vs. *City of Milwaukee*, 88 Wis. 383, 60 N. W. 270;
Sutton vs. *State*, 96 Tenn. 694, 36 S. W. 697;
State vs. *Goodwill*, 33 W. Va. 179.

a. The statute does not meet constitutional tests. There is no inherent difference between the life termer and the middle-aged long termer.

Report State Board Prison Directors, 1909-10, 69 and 185; 70 and 184.

b. Owing to the condition of the California law, certain prisoners are, with reference to immunity from punishment, in the same position as life termers.

Sec. 669, Code Civ. Proc.;
Sec. 245, Penal Code;
Ex parte Morton, 132 Cal. 346;
Sec. 667, Penal Code.

c. The statute should be viewed from a broad position. It is unequal, special and discriminatory and unconstitutional.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of California erred in holding that section 246 of the Penal Code of the State of California is not inhibited by article XIV of the Constitution of the United States, section 1 thereof reading as follows: "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

No. 21543.

IN THE

Supreme Court of the United States

October Term, 1908.

No. 747.

JAMES W. FINLEY,
Plaintiff and Appellant in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant and Respondent in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Plaintiff in error was, after indictment returned, tried, convicted and sentenced to death under section 246 of the Penal Code of the State of California. The section reads as follows:

> "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury is punishable with death."

Upon appeal the judgment was affirmed by the ultimate State tribunal. (*People* vs. *Finley*, 153 Cal. 59.) Thereafter the cause was brought here upon writ of

error to the Supreme Court of the State of California.

The question for review here is whether section 246, *supra,* is violative of the Fourteenth Amendment to the Constitution of the United States.

This question was duly presented to the State Court and the decision was in favor of the validity of the statute.

Transcript, p. 7;
People vs. *Finley,* 153 Cal. 59;
Sec. 709, U. S. Rev. Stats.

To ascertain that the Federal question was properly raised and that this Court has jurisdiction of the cause, the decision of the Supreme Court of the State of California is entitled to consideration.

*Sec. 49, Code Civ. Proc.;

Gross vs. *U. S. Mortgage Co.,* 108 U. S. 427;
Phila. Fire Association vs. *New York,* 119 U. S. 110.

The opinion amply shows that one of the "principal "contentions of the appellant" (Trans., p. 8), the plaintiff in error here, was that the section in question is inhibited by article XIV of the Federal Constitution, and that this contention was overruled.

The rules governing classification within the meaning of the equal protection clause of the Amendment are settled beyond dispute. It is their application only, in the judicial process of inclusion and exclusion, that gives rise to question.

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*"In the determination of causes, all decisions of the Supreme Court in bank, or in departments shall be given in writing, and the grounds of the decision shall be stated."

Barbier vs. *Connolly*, 113 U. S. 27, 31;
Yick Wo vs. *Hopkins*, 118 U. S. 356;
Board of Education vs. *Alliance Assurance Co.*, 159 Fed. 994, 999.

The classical language upon the subject is found in *Barbier* vs. *Connolly, supra.*

> "The fourteenth amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights . . . that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

A recent decision (*Board of Education* vs. *Alliance Assurance Co., supra*) gives the following summary of the entire law upon the subject found in the decisions:

> "An act applying uniformly to the whole of any single class of individuals or objects, where the classification is founded upon some natural intrinsic or constitutional distinction, is a general law. In order to make the law general, the classification must not be arbitrary, but must be founded upon some natural intrinsic or constitutional distinction, and some reason must appear why the act is not made to apply generally to all classes. Although a law is general when it applies equally to all individuals of a class founded upon a natural intrinsic or constitutional distinction, it is not general if it confers particular

> privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. . . . It is held that the mere fact that the class is founded on some intrinsic difference does not necessarily justify a special rule. There must be some relation between the difference in class and the difference in the rule of practice involved."

To determine whether the statute involved meets the broad yet exacting terms of constitutional requirements, regard must be had to the reason and purpose of its enactment.

The statute is anomalous in the history of modern penal legislation. The marked tendency of the law is to diminish capital punishment—not to increase it. From the early part of the nineteenth century when death was a frequent punishment—and crime was rife—a large advance has been made in penal reform.

In response to this movement Colorado, Maine, Michigan, Rhode Island and Wisconsin, as well as a number of European and South American countries, have abolished the death penalty and a number of jurisdictions in the Union have substantially decreased the number of offenses thus punishable. In the community at large there exists a strong and ever increasing sentiment against "judicial murder." (Boies, Science of Penology, 119.) The California statute is the only retrogression—the only step backward in a beneficent advance.

No trivial reason could prompt this exceptional

statute. In view of the rapidity and deep seated character of penal reform, the Legislature must have had in mind some broad, substantial ground for the act. They could not otherwise justify it. The Legislature, therefore, did not base the statute on the ground that life termers *per se* are a more dangerous class than other prisoners. That ground is narrow and not founded in fact.

People vs. *Finley,* 153 Cal. 59, *contra.*

The term of years to which a convict is subjected is not determined exclusively by his character or the menace he offers to society. His habits do not determine the length of his term. In fixing punishment there are additional elements of equally serious consideration. He must be taught a lesson, an example must be made of him as a warning to the criminal world, the crime must be expiated and respect for law maintained. The gravity of the offense is often of controlling influence. To these considerations rather than to the mere character of the man, his term of imprisonment is more often referable. (Drahms, The Criminal, 364.) Indeed, a man's character and habits are seldom known at the time of sentence. The law itself classifies punishment according to the gravity of the offense, except in the case of habitual criminals, where the classification rests, not upon the dangerous and desperate character of the criminal, but upon the recurrence of his criminality. The Penal Code establishes punishment for crimes, but no systematic provision for individual cases. The mere fact therefore that a person is serving a long term, is not evidence that he is

more dangerous to society than a person serving a shorter term.

Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374, 376.

To base the statute upon the ground that life termers are more dangerous than their fellow prisoners, is to declare a violent presumption. The Legislature cannot prophesy that all life termers hereafter to be committed are the most dangerous to society, neither can it assure that courts, in passing sentence, will consider only habit of mind and character. A life termer is not necessarily any more depraved or desperate than any other prisoner. His term is not based upon his lack of moral fibre. The California Penal Code contains numerous provisions authorizing imprisonment for life as a maximum punishment. However, the convict incarcerated for two years, the limit for an assault with a deadly weapon, may be more abandoned and vicious than the robber serving life.

In view of the fact that physical and mental qualities produce criminality, the term of imprisonment in itself does not differentiate convicts in respect to viciousness. The length of a term may embitter, but never mollify savage instincts. The desperate man is not the less desperate because he serves a short term.

It has been urged that life termers become abandoned and desperate through loss of all hope of freedom, that other prisoners are encouraged to proper conduct by the credit system, and that upon these differences the statute is well founded.

People vs. *Finley,* 153 Cal. 59.

This theory is without support in fact. A parole law of broad proportions furnishes equal if not greater hope to life termers

*Stats. California, 1901, p. 82.

‡Rule V. Rules and regulations for paroling prisoners. (California State Board of Prison Directors.)

†Rule IX. Rules and regulations for paroling prisoners. (*Ibid.*)

Under these laws, a life termer may be paroled after eight years. The fact is, that with 173 life termers incarcerated in the California State Prison at San Quentin, 38 life termers are upon parole.

Report State Board of Prison Directors, 1910, p. 73.

Both classes are inspired to good conduct by laws framed to that end. If their rights are lost, no relative change in position takes place. Both are punished, retaining the right again to take advantage of parole and credit laws.

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*Section 1. The State Board of Prison Directors of this State shall have power to establish rules and regulations under which any prisoner who is now or hereafter, may be imprisoned in any State Prison and who may have served one calendar year of the term for which he was convicted and who has not previously been convicted of a felony and served a term in a penal institution, may be allowed to go upon parole * * * provided that no prisoner imprisoned under sentence of life, shall be paroled until he shall have served at least 7 calendar years.

‡Half term must be served.

No application for parole shall be filed by the clerk until the prisoner shall have served one-half his sentence. * * *

†Life termers and those who shall have served 8 years solid time, shall be placed upon a separate calendar and their application shall be considered in the order in which they are filed with the Clerk.

Mere loss in civil rights has no impress upon character. A total loss of the right to participate in government, as compared with a temporary loss thereof, is absolutely without influence in producing desperate and depraved spirits. This difference could not support the statute. It is as idle a distinction as the typical example of a difference in complexion.

People vs. *Finley*, 153 Cal. 59, 62, *contra.*

The undisputed facts are to the contrary of the unreasonable hypothesis that life termers are more dangerous than other criminals. As a rule, they are among the better class of prisoners. They soon become reconciled to their lot. They realize that unless paroled or pardoned they are incarcerated till death. The convict of mature years serving a long term, practically a life termer, knows that his credits are of no avail; that if he lives the period of his term, he will leave prison an aged man, without trade, means or physical powers. He becomes the dangerous man. He is the dangerous man.

The statute would not be valid if predicated upon this ground. Punishment based on the length of term is unequal and inhibited.

Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374;
State vs. *Lewin,* 53 Kan. 679, 37 Pac. 168.
In re Cook, 13 Cal. App. 399.

The statute held invalid in the Mallon case, *supra,* based punishment for an escape upon the length of the term being served.

The Court said, page 376:

> "While the legislature in preventing and fixing punishment for crime has very great latitude in classifying the same, still the rule is well recognized that in making such classification it should be natural, and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime."

The statute which is cited with emphasis in *In re Finley,* 1 Cal. App. 198, at page 209, and which is there declared to present the "strongest analogy" to Section 246, Penal Code, the section now attacked, has since that decision been declared unconstitutional.

In re Cook, 13 Cal. App. 399.

The term of a prisoner has no relation to the gravity of an offense. Basing the statute purely upon that ground would render it, as in the cases cited, unconstitutional. The classification has no reasonable relation to the purposes of the statute.

If the Legislature had intended to fix a punishment for crimes committed by life termers on the theory that they are the most dangerous class of prisoners, it would have applied the statute in question to assaults with intent to commit murder, escapes, robberies and other felonies.

We must seek a broader ground for legislative action in passing this repressive and harsh statute—a ground that appears upon its face. It proceeds on the proposition that since life termers are no longer subject to adequate punishment, they must therefore be punished with death for an assault with a deadly weapon. That

presents the only possible reason for the discrimination. Neither length of term nor criminal character, but lack of punishment is the predicate of the statute under attack.

Ex parte Finley, 1 Cal. App. 202.

The Court, in this case, maintains this conclusion in the following language:

> "Through his own misconduct, such (life) convict has forever forfeited his liberty and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached; and if this only remaining penalty cannot be inflicted, then such convict stands immune from further human retribution."

With the reason and purpose thereof established, the statute may be subjected to constitutional tests. Questions of classification, and the operation and effect of a statute with reference to things classified, are considered by the courts in a thoroughly practical light. If, in this view the statute takes no cognizance of prisoners in like situation as the life termer with reference to the purpose of the act, it is invalid.

The authorities hold that the Legislature, in distinguishing those included and excluded must base the statute upon real, substantial differences. The distinctions contemplated in dealing with questions of class legislation are not those that exist in name only. The label is not conclusive. Calling persons by a class name, designating the thing classified by a generic, general term, is not sufficient. The law contemplates distinc-

tions founded in actual practice, and practical, subsisting differences. It is not a possible difference that removes a statute from the constitutional inhibition. If that were so, every classification would be proper, because some slight reason can always be found for distinctions made. A seeming distinction, or theoretical difference does not suffice. The distinction must be actual—the line of division must exist in fact.

Ho Ah Kow vs. *Nunan,* 5 Sawyer, 552;
Gulf etc. Ry. Co. vs. *Ellis,* 165 U. S. 150;
Cotting vs. *Kansas City Stock Yards,* 183 U. S. 79;
Connolly vs. *Union Sewer Pipe Co.,* 184 U. S. 540;
Board of Education vs. *Alliance Assurance Co.,* 159 Fed. 994;
State vs. *Loomis,* 115 Mo. 307, 22 S. W. 350;
State vs. *Miksicek,* 125 S. W. 506, Mo. 1910.
State vs. *Mitchell,* 97 Me. 66, 73;
State vs. *Julow,* 129 Mo. 163, 31 S. W. 781, at 783;
State vs. *Thomas,* 138 Mo. 95, 39 S. W. 481;
Murray vs. *Board of Commissioners,* 81 Minn. 359, 84 N. W. 103;
Nichols vs. *Walter,* 37 Minn. 264, 33 N. W. 800;
People vs. *Van De Carr,* 86 N. Y. S. 644;
Jones vs. *C. R. Railway Co.,* 231 Ill. 302, 308;
State vs. *Wright,* 53 Ore. 344, 100 Pac. 296;
State vs. *Hammer,* 42 N. J. L. 435;
In re Van Horne, 74 N. J. E. 600, 70 Atl. 986;
Gillespie vs. *People,* 64 N. E. 533, Illinois;
Phipps vs. *Wis. Cent. Ry. Co.,* 133 Wis. 153, 143 N. W. 456;

Johnson vs. *City of Milwaukee,* 88 Wis. 383, 60 N. W. 270;
Sutton vs. *State,* 96 Tenn. 694, 36 S. W. 697;
State vs. *Goodwill,* 33 W. Va. 179.

The following quotations from the cases cited point to the marked emphasis that courts have laid upon the practical consideration of this subject. (The italics in the quotations are ours.)

> "These differentiations or classifications must be reasonable and based upon *real differences* in the situation, condition and tendencies of things."
>
> *State* vs. *Mitchell,* 97 Me. 66, 71.

The statute involved in that case discriminated between persons paying twenty-five dollars a year taxes on a stock in trade and those paying less, exempting the former from the payment thereof, while requiring the latter to pay them. The discrimination was held invalid.

> "Plainly, a law may be general in its provisions and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such law may be in contravention of this constitutional prohibition. . . . But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification, must be of such a nature as to make the objects so designated as peculiarly requiring exclusive legislation. There must be ***substantial distinction,*** having a reference to the

subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded."

State vs. *Hammer,* 42 N. J. L. 435, 440.

"All classification must be based upon *substantial distinctions* which make one class *really* different from another. . . . The classification adopted must be germane to the purpose of the law."

Johnson vs. *The City of Milwaukee,* 88 Wis. 383, 390.

"When a law is made applicable only to one class of individuals, however, there must be some actual, substantial difference between the individuals so classified and other individuals in the state or community, when considered with reference to the purposes of the legislation."

Jones vs. *The Chicago etc. Railway Co.,* 231 Ill. 302, 308.

In the light of these cases the statute fails. There is no inherent difference between a life termer and a man whose term covers his life, who enters at the age of 40 or 50 years, for a term of fifty or more years. There are convicts in the California penitentiaries undergoing terms ranging from forty to ninety-nine years. In 1910 there were 57 such. (Report State Board of Prison Directors, 1909-10, pp. 69 and 185.) In the same year 300 prisoners were committed whose ages ranged from 50 to 81 years. (pp. 70 and 184.) In spite of a proper deduction for credits, the terms of many of these men

easily reach far beyond the average or possible length of life. Is not the convict committed at age fifty, for sixty or seventy years, a life termer?

The long termer is in the same relation to the purpose of the act as the life termer. No substantial or practical or real difference can be pointed out in their situations. The act includes one, excludes the other. It therefore is invalid.

In addition, however, there is a large and growing class of convicts, who, by virtue of a recognized defect in the California law, cannot be punished for an assault with a deadly weapon with malice aforethought.

A sentence imposed for a conviction had subsequent to a prior sentence must run concurrently with the first sentence imposed.

*Sec. 669, Penal Code;
Ex parte Morton, 132 Cal. 346;
Ex parte McGuire, 135 Cal. 339, at p. 343;
Ex parte Casey, 42 Cal. Dec. 65 (July 11, 1911).

At the time of the passage of section 246 of the Penal Code, the largest penalty that could be imposed for an assault with a deadly weapon, was ten years (with or without malice aforethought), when a prior conviction was charged.

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*When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged . . .

†Sec. 245, Penal Code;
**Sec. 666, Penal Code, 1907.

This sentence must run concurrently with the one being served, owing to the defective condition of the statute, as admitted in the Morton case.

Sec. 669, Penal Code;
Ex parte Morton, 132 Cal. 346.

It follows that a convict serving a long term of years is immune from punishment for a considerable period. If the offense was committed during the first ten years of a twenty-year term, the punishment imposed, namely, ten years, runs concurrently with the prior sentence and expires without having lengthened the term. The offender goes unpunished for his crime. During the first ten years of his term, therefore, he was as immune from punishment for an assault with a deadly weapon as a life termer.

Under the law as it existed upon the adoption of the statute the following table shows the period during

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†Every person who commits an assault upon the person of another with a deadly weapon . . . is punishable by imprisonment in the state prison, or in a county jail, not exceeding two years.

**Every person, who, having been convicted of petty larceny, or of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows:

. . . .

2. If the offense of which such person is subsequently convicted is such, that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, the person convicted of such subsequent offenses is punishable by imprisonment in the state prison not exceeding ten years.

which certain prisoners were immune from punishment, and for that reason, in the same position to the purposes of the act as a life termer.

Length of Term.	*Period of Immunity.*
20 years	10 years
25 "	15 "
30 "	20 "
40 "	30 "
50 "	40 "

At the session of 1909, the Legislature enacted section 667* of the Penal Code and by amending section 666 so that it now applies only to persons convicted of petty larceny made the condition more glaring than theretofore. The second offense is now punishable with imprisonment for two years (Section 245, Penal Code, Section 667, Penal Code), the maximum of an assault with a deadly weapon. The period of immunity therefore extends over the entire term of a prisoner except the last two years thereof. It affects almost the entire prison population and the discrimination is more extensive by reason of the new section. It results, therefore, that if two convicts, one a life termer, commit an assault with a deadly weapon, one is hanged, the other is not punished.

*Every person who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that, upon a first conviction an offender would be punishable by imprisonment in the state prison, such person is punishable by imprisonment in the state prison, for the maximum period for which he might have been sentenced, if such offense had been his first offense.

Sec. 246, Penal Code;
Ex parte Mallon, 132 Cal. 346.

For these periods of immunity from punishment, the long termers have been, and even the short termers now are in the exact position of life termers. Long termers and life termers and convicts within the years of immunity form a class by themselves—distinguished by freedom from adequate punishment for the offense embraced in the statute. If this characteristic requires classification, the Legislature must include all having the same characteristic, and exclude all who, by their natural and inherent position, are within the basis of the classification. The Legislature cannot arbitrarily create a class—it must legislate for a class already in existence.

Habitual criminal statutes furnish no analogy upon which to determine the present question. Those statutes were primarily attacked on the theory that they were *ex post facto.*

Moore vs. *Missouri,* 159 U. S. 676;
People vs. *Coleman,* 145 Cal. 613.

That contention is not suggested here. It is urged here that equal protection of the laws is denied, and with reference to the classification under this constitutional provision, each statute must be determined upon the nature and facts of the particular selection attempted to be made by it.

Plaintiff in error urges this Court to take a broad ground in determining the relationship between section 246 of the Penal Code of the State of California and

the Fourteenth Amendment to the Constitution of the United States. The statute is unequal in character, special and discriminatory in its effects. A clear view of the actual facts determines these effects and stamps it unconstitutional and inhibited. The label cannot conclude the judgment or alter the facts.

The statute is unworthy of an enlightened commonwealth. It provides awful retribution without justification. It rankles with unholy vengeance. We submit that it must be held inhibited by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted.

G. C. RINGOLSKY,
Attorney for Plaintiff in Error.

H. G. W. Dinkelspiel.

No. 15

FILED.

OCT 9 1911

JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

JAMES W. FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

No. 15

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

(By SAMUEL T. BUSH, of Counsel.)

C. C. CALHOUN,
JAMES N. SHARP,
Attorneys for Plaintiff in Error.

Filed this ..... day of October, 1911.

.....*Clerk.*

By .....*Deputy Clerk.*

IN THE

SUPREME COURT

OF THE

UNITED STATES

JAMES W. FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error was indicted by the Grand Jury of the County of Sacramento, State of California, for an assault with a deadly weapon with malice aforethought, as defined by Section 246 of the Penal Code of the State of California, which reads as follows:

"Every person undergoing a life sentence in a state prison of this state who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

Thereafter, defendant Finley was duly tried by a jury and convicted of the offence charged in the indictment and was subsequently duly and regularly sentenced to suffer the death penalty. Thereupon and thereafter, defendant duly perfected an appeal to the Supreme Court of the State ~~of State~~ of California, which appeal was regularly heard and determined and the judgment of the Superior Court of said Sacramento County was thereupon affirmed. Plaintiff in error thereafter duly and regularly applied for a Writ of Error to the Supreme Court of the United States, which application was granted.

Plaintiff in error filed his assignment of errors as follows:

(1) That the Supreme Court of the State of California erred in holding and deciding that Section 246 of the Penal Code of the State of California does not conflict with and violate Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(2) That the said Court erred in holding and deciding that said Section 246 of the Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

(3) That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the

same protection of the laws which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

(4) That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence and a convict undergoing a sentence for a period of years, which in all human probability will exceed the term of natural life.

The entire attack made by plaintiff in error on the Statute in question and on the decision of the Supreme Court of the State of California affirming the judgment of the Superior Court of said Sacramento County, and upholding the constitutionality of Section 246 of the Penal Code, involves the interpretation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and its applicability to said Section 246 of said Penal Code.

Accordingly, the four specifications of error all call in question the constitutionality of the Statute under which the defendant was convicted and sentenced and may be converged and consolidated into one common proposition, namely, that the Statute establishes an unreasonable distinction and discrimination between certain classes of persons standing in the same relation to the law and in the same position relatively, creating thereby what is commonly known as class legislation, and particularly that no reasonable distinction can be

drawn between a life term prisoner and a long term prisoner so far as the intent and purposes of this Statute are concerned.

The opinion of the Supreme Court of the State of California affirming the judgment of the lower Court, to which we desire to give special consideration, reads as follows:

> "As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed ,of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes, and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the State prisons, which attempts were usually organized and headed by 'life-termers', form a part of the history of our State. Indeed it is known, that at times the prison officials have deemed it wise to clothe the 'life-termers' in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well-recognized condition of affairs it seemed expedient to the Legislature to meet the situation by the enactment of Section 246 of the Penal Code.
>
> "It is upon the authority of the City of Pasadena vs. Stimson, 91 Cal. 252 (27 Pac. 604), and the numerous

cases of like import, declaring that class legislation must be based upon some natural, intrinsic, constitutional, reasonable distinction, or otherwise that is in violation of Section 11 of Article I of the Constitution of this State, that the appellant argues against the validity of the code provision. In this regard, his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years, which in all probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The 'life-termers', as has been said, while within the prison walls, constitute a class by themselves, a class recognized by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good-conduct laws, whereby the term of imprisonment is shortened, as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years. And, finally, if the Legislature sought to make the law applicable to convicts other than 'life-termers', the difficulty which it would experience in fixing the terms of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the 'life-termer' and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions."

The decision in question, from its tenor, imports that those convicts commonly known as "life-

termers'' justify a distinction which is reasonable, intrinsic, natural and constitutional as compared to long term prisoners, and special legislation may be enacted for the purpose of punishing that class. In order that we may demonstrate the erroneous conclusions reached by the Supreme Court of the State of California, it is incumbent upon us to analyze the reasons as herein quoted for its reaching that decision, and to point out those facts therein stated and accepted to be true and which records, statistics and general common and judicial knowledge, in our opinion, bear us out to the contrary.

> In the Seventeenth Biennial Report of the Colorado State Penitentiary, the warden of that institution, speaking of the corrigibility and tractible disposition of life term prisoners, incidentally, and while discussing the use of convict labor for road making, in that report recently published says: ''With regard to the selection of convicts for road and ranch work I insist that this selection of convicts cannot be governed by the length of the sentence or nature of the crime. My experience has absolutely disproved the accepted theory that 'only short time men' can be trusted with this large measure of liberty. At present I am working eight 'life termers' away from the prison, their words of honor their only guard. In every camp, on every ranch, there are long sentence men, the type known as 'desperate criminals.' As a matter of fact, I find this kind—the strong characters of crime—much more susceptible to fair appeal than the jelly-back offenders. My real trouble is with the 'hoboes' who are always short term men.''

As to the destruction of the hopes of this type of prisoner; can it be said that a long term prisoner undergoing a sentence the duration of which will in all probability exceed the term of his natural life is not equally subject to the same temptations, the same emotions and to the same desire to escape from restraint as is the life termer? And as a consequence, will he not equally under like conditions be as reckless in his conduct and commit crimes as brutal as will the life term prisoner? Is not the law equally as impotent to mete out adequate punishment to long term prisoners as it is to life termers.

Upon reliable authority, we are informed that in the penal institutions of this State, the characteristic garb of the desperate criminal, known as the "red shirt", is not confined to "life termers", or to any prisoner undergoing any particular term of sentence, but is compelled to be worn by any convict incarcerated within a State prison of the State of California who has committed some crime while therein confined, or flagrantly violated some prison rule or otherwise evinced his viciousness.

While it is true that the good conduct laws prevailing in most of the United States are not applicable to a life term prisoner, yet he is alike with all other prisoners entitled to the benefit of the parole laws and to the benefit of pardon; and withal for what useful purpose are good conduct laws, so far

as the advantages to accrue from the shortening of a prisoner's term are concerned, to a prisoner undergoing a sentence of forty, fifty, or sixty years, which in all probability, even though he be given full credits for good conduct, will outlast the period of his natural life.

As a basis for upholding the validity of the statute in question, and for establishing its soundness and reasonableness, our learned State Supreme Court also says that the difficulty the Legislature would experience in fixing the term of imprisonment for convicts other than "life termers" who should commit the offense prescribed by Section 246 of the Penal Code, is sufficient to indicate that there is a natural and constitutional difference between the two classes of prisoners herein named. Counsel cannot conceive of any difficulty the Legislature would encounter in prescribing the *death penalty* under Section 246 for a long term prisoner committing the same offense or any particular prisoner undergoing sentence for the commission of specific offenses, as well as for a life term prisoner. A statute framed along such lines cannot possibly be subject to any attack affecting its constitutionality, and there is reason and justice, law and common sense in our contention that the only statute that will not be subject to attack on the ground of its unconstitutionality prescribing and

invoking the death penalty for the commission of the offense defined by Section 246 of the Penal Code is a statute that will not take into consideration in prescribing the penalty the *duration* of the prior term of the prisoner committing the crime, which term, as our statutes now exist, may be fixed for a period of years or for life at the caprice, whim, passion or prejudice of some trial judge.

There are many statutes contained in the Penal Code of the State of California where the punishment to be meted out to the defendant convicted of the crime charged may be either for a term of years or for life, such as rape, Penal Code, Section 264; robbery, Penal Code, Section 213, and other crimes.

Two prisoners charged with the commission of the same crime, tried by juries in different counties of the State of California, duly and regularly convicted, both sentenced to the same penitentiary even though they commit the offense inhibited by Section 246 of the Penal Code, may not suffer the same punishment therefor, because one of those defendants, owing to the frame of mind of the trial judge imposing the sentence and his particular personal prejudices and feelings in the matter, or against that particular crime, may be sentenced for a term of years. The other for the same reasons and circumstances though the commission of his offense may not be more heinous may be

sentenced for a term of life. These two prisoners, while undergoing their respective sentences in the State prison, may engage in combat and be equally guilty of an assault. The life term prisoner, under Section 246 of the Penal Code, would be subject to the death penalty. The long term prisoner would not be subject to punishment under that section.

A statute similar to the one here attacked, can be easily enacted by the Legislature and be more effective in its purposes, and no question arise as to its constitutionality, by prescribing that certain prisoners confined in the State prisons who had previously committed certain specific crimes naming them, or prescribing that prisoners who have been previously convicted of crime and are undergoing a second or third sentence, committing the offence inhibited by Section 246 of the Penal Code should suffer the death penalty. Such a statute would not be class legislation and would act upon all alike under like circumstances. As the statute now reads, it is cruel and inhuman, barbarous, unreasonable and unjust. It leaves wide open the avenue for escape of that great class of criminals usually the most vicious type, known as "habitual criminals" who are repeatedly serving successive sentences, and by reason of their experience in the commission of crimes and contact with the courts, have become so skilled in their pleas as to escape

the possibility of the imposition of a life sentence, all of which type, under Section 246 of the Penal Code, even though committing the crime therein inhibited, would not be subject to punishment thereunder.

All of the cases cited by the learned Attorney-General of the State of California, such as the cases of *Hayes* vs. *Missouri* and *Moore* vs. *Missouri*, cited in his brief and relied upon by him in his argument, are cases upholding the validity and constitutionality of the habitual criminal acts, which are a part of the penal laws of nearly all the States in the Union. We have no fault to find with those laws nor with the decisions upholding same. There can be no question as to their constitutionality. Sections 666 and 667 of the Penal Code of the State of California are such acts. It will be observed that all of the statutes without exception, in prescribing the increased punishment for the commission of the subsequent offence take into consideration either the nature of the crime of which the defendant was previously convicted or the amount of punishment prescribed for the commission of the crime subsequently committed and do not take into consideration the *duration of the sentence* imposed for the commission of the prior offence, which is the foundation for the in-

creased punishment provided for by Section 246 of the California Penal Code.

In the case of *State* vs. *Lewin,* 53 Kan. 667, 37 Pac. 168, a statute prescribing that a prisoner escaping from a State's prison upon conviction of that offence, could be punished by the imposition of a sentence equal to twice the term he was undergoing at the time of his escape, was declared unconstitutional by the Supreme Court of the State of Kansas for the reason that it was held to be class legislation and undue discrimination as to certain prisoners and because all prisoners committing the same offence were not punished equally or alike and also because the punishment was based upon the duration of the sentence the prisoner was undergoing at the time of his escape, instead of the punishment being based upon the nature of the specific offence committed or the nature of the prior crime under which the prisoner was serving his sentence at the time of his escape.

The Penal Code of the State of California prior to 1905 contained a statute greatly similar to the Kansas statute held by the Supreme Court of that State to be unconstitutional. The California Legislature, conceding that it had exceeded its constitutional powers amended in 1905 Section 105 of the Penal Code, prescribing the punishment for the escape of prisoners so as to remove the objection

that might have theretofore been raised against it with regard to its constitutionaliy.

California Penal Code, Deering's Edition 1909, *and Code Commissioner's Foot Note to Section* 105.

When this question was determined by the District Court of Appeal of the State of California, in and for the Third Appellate District, *in re Finley,* 1 Cal. App. 208, that Court maintained, among other reasons for supporting the constitutionality of Section 246, was the strong analogy that existed between said Section 246 and Sections 101, 105, Chapters 2 and 3 of the California Penal Code, relating to rescues and escapes. The decision of the Appellate Court was rendered on the 20th day of June, 1905, several months after those particular sections and the chapters referred to in that decision had been amended by the Legislature. There was therefore no existing analogy at the time of the rendition of that opinion, and the amendments in question made by the Legislature silently but powerfully acquiesce in our contention here made.

In conclusion, it may be said that counsel has been unable, after the most exhaustive research, to find among the Statutes of all of the States of the Union a law similar to the one here involved, and it is respectfully submitted in our opinion that it should not be allowed to stand as a valid Statute

in the State of California. There is no constitutional, intrinsic or reasonable distinction which justifies the segregation of a life term prisoner from other classes of prisoners for the purposes of invoking and applying the death sentence to them, when convicted of assault with a deadly weapon while confined within a state prison.

Respectfully submitted,

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Of Counsel.

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Attorneys for Plaintiff in Error.

23

No. 15

APR 27 1911

JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

JAMES FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF DEFENDANT IN ERROR.

U. S. WEBB, Attorney General
of the State of California,
Attorney for Defendant in Error.

Filed this..... day of April, 1911.

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By.....*Deputy Clerk.*

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IN THE

SUPREME COURT

OF THE

UNITED STATES

JAMES W. FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Plaintiff in error was indicted by the grand jury of the County of Sacramento, State of California, for an assault with a deadly weapon with malice aforethought, as defined by Section 246 of the Penal Code of California, which reads as follows:

> "Every person undergoing a life sentence in a state prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

He was thereupon properly tried, and convicted of the offense charged in the indictment, and was thereafter sentenced to suffer the penalty of death.

Defendant thereupon took and perfected an appeal to the Supreme Court of the State of California, and after consideration by said court the judgment appealed from was affirmed.

Thereupon defendant applied for a writ of error to the Supreme Court of the United States, and said writ was granted.

Plaintiff in error assigns as error:

1. That the Supreme Court of the State of California erred in holding and deciding that section 246 of the Penal Code of the State of California does not contravene and violate section 1 of the Fourteenth Amendment of the Constitution of the United States.

2. That the said court erred in holding and deciding that said section 246 of said Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

3. That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the same protection of the laws, which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

4. That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence, and a convict undergoing a sentence for a period of years, which in all human probability will exceed the term of natural life.

The appeal of defendant Finley was heard by the Supreme Court of the State of California and the judgment was affirmed. In the opinion of that court many reasons are set forth clearly showing that no

arbitrary discriminations or distinctions have been made in or by the Statute of California as to persons standing in the same relation to the subject of legislation dealt with by such statute.

People vs. *Finley*, 153 Cal. 61.

In the opinion the following language is used:

"The principal contentions of the appellant, advanced in different forms, resolve themselves into two propositions, both going to the constitutionality and validity of section 246 of the Penal Code. The first of these propositions is that it denies to the defendant the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Second, that it contravenes the provisions of section 11 of article I of the Constitution of this State declaring that all laws of a general nature shall have a uniform operation.

As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed, of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers, and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by 'life-termers,' form a part of the history of our State. Indeed, it is known that at times the prison officials have deemed it wise to clothe the 'life-termers' in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well-

recognized condition of affairs it seemed expedient to the legislature to meet the situation by the enactment of section 246 of the Penal Code.

It is upon the authority of the *City of Pasadena* vs. *Stimson*, 91 Cal. 252, and the numerous cases of like import, declaring that class legislation must be based upon some natural, intrinsic, constitutional, reasonable distinction, or otherwise that it is in violation of section 11 of article I of the Constitution of this State, that the appellant argues against the validity of the code provision. In this regard his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The 'life-termers,' as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years. And, finally, if the legislature sought to make the law applicable to convicts other than 'life-termers,' the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the 'life-termer' and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

Nor can it be said that the act in question is violative of the Fourteenth Amendment of the Constitution of the United States. This amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in

the same place and under like circumstances. (*Missouri* vs. *Lewis*, 101 U. S. 22.) Paraphrasing the language of the Supreme Court of the United States in *Moore* vs. *Missouri*, 159 U. S. 676 (16 Sup. Ct. 179), we can not perceive that appellant was denied the equal protection of the laws for every other person in like cases with him and convicted as he has been would be subjected to like punishment."

It is for the state court to determine whether or not its statutes are valid under the state constitution, and whether a person has received equal protection of the laws of the State in a regular administration of the criminal law.

Leeper vs. *Texas*, 139 U. S. 462;
O'Neil vs. *Vermont*, 144 U. S. 336.

In *Hayes* vs. *Missouri*, *post*, it is shown that the Constitution of the United States "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

Hayes vs. *Missouri*, 120 U. S. 71.

The following language is used in the opinion of the court:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier* vs. *Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carry-

ing out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' (113 U. S. 27, 32.)

In *Missouri* vs. *Lewis*, 101 U. S. 22, it was held, that the last clause of the amendment as to the equal protection of the laws, was not violated by any diversity in the jurisdiction of the several courts which the State might establish, as to subject-matter, amount, or finality of their decisions if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances, to resort to them for redress; that the State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government; and that, as respects the administration of justice, it may establish one system of courts for cities and another for rural districts. And we may add, that the systems of procedure in them may be different without violating any provision of the Fourteenth Amendment."

In the case of *Moore* vs. *Missouri, post,* consideration is had of the constitutionality of statutes providing for the punishment of habitual criminals. An examination of the statutes of many states of the Union, concerning the prosecution of second offenses committed by habitual criminals, shows that those statutes properly divide such criminals into different classes, with relation to the character or grade of the first perpetrated offense, and also with reference to the character and grade of the second perpetrated offense for which a defendant may then be upon trial.

Moore vs. *Missouri*, 159 U. S. 677.

The court reasons as follows:

"The reason for holding that the accused is not again punished for the first offense is given in *Ross's* case by Chief

Justice Parker, that 'the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself'; in *Plumbly* vs. *Commonwealth*, by Chief Justice Shaw, that the statute 'imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious is doing the work of reform for which it was designed'; in *People* vs. *Stanley*, that 'the punishment for the second is increased, because by his persistence in the perpetration of crime, he has evinced a depravity which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense'; and in *Kelly* vs. *People*, 'that it is just that an old offender should be punished more severely for a second offense—that repetition of the offense aggravates guilt.' It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that plaintiff in error was not twice in jeopardy for the same offense or that the increase of his punishment by reason of the commission of the first offense was not cruel and unusual. *In re Kemmler*, 136 U. S. 436. Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every other person in like case with him, and convicted as he had been, would be subjected to the like punishment.

The Fourteenth Amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *Missouri* vs. *Lewis*, 101 U. S. 22. The general doctrine is that that amendment, in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the State to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State. *In re Converse*, 137 U. S. 624. And the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against

the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. *Pace* vs. *Alabama*, 106 U. S. 583; *Leeper* vs. *Texas*, 139 U. S. 462."

In the case of *Pace* vs. *Alabama, post*, consideration was had of a statute of Alabama which, upon a superficial examination, would seem to make a class distinction based upon color of an individual. The decision of this Honorable Court shows, however, that when the precise nature of that statute is considered, the punishment of each person committing the offense charged is the same, irrespective of color, and that there is, as to persons affected by that statute, no arbitrary classification intended to operate merely as against a class of persons. So, also, the statute of California under consideration has not been intended to operate against any class of persons, considered merely as a class. No division of persons into a class by reference to color, nationality or other class distinction has been made. The statute of California bears against all persons similarly situated, who maliciously commit the offense described, and the classification is based upon inherent distinctions concerning such class.

The statute does not create the class for the purposes set forth therein, but treats the class as it finds it. The members of this class naturally fall into a group and separate themselves from other groups in society, because they possess like qualities, attributes and characteristics, which, of their own force, bring

them together. Thus, the law does not arbitrarily select certain persons and classify them for the purpose of this statute, but it deals with all persons alike, who, by reason of environment and characteristics, have grouped themselves together and have created a condition in society which must be coped with. Plaintiff in error contends that the law discriminates because it does not include in its treatment those who are serving long terms of imprisonment as well as life-termers; but those who are undergoing a sentence for a period of years which might exceed the term of natural life constitute another class, which do not have all the characteristics of the class dealt with in the statute. They do not have the same hope of parole. As to those sentenced for less than life, there is always a hope left that they may outlive their term. Although it may be proper to deal with long-termers, upon some such basis as has been adopted in the case of life-termers, this is a question for the legislature and not for the courts, and the fact that the legislature has not seen fit to so deal with long-termers does not constitute a discrimination against life-termers.

Pace vs. *Alabama*, 106 U. S. 585.

It is there stated:

> "The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the

other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed can not be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

The Constitution of California provides that no person shall be twice put in jeopardy; that cruel or unusual punishment shall not be inflicted, and that laws must operate uniformly upon all persons standing in the same relation to the law.

The decision of the Supreme Court of California holds that the statute under consideration does not contravene any of the provisions of the Constitution of California.

In the case of *In re Kemmler*, 136 U. S. 447, it appears that this honorable court will in some cases carefully examine and consider the reasons set forth in a decision, which have impelled the highest court of a state to its determination that a certain statute is not in contravention of the provisions of a state constitution, in instances where such provisions are comparable with provisions of substantially like character embraced in the Constitution of the United States.

In the case of *Kemmler*, the court says:

> "The decision of the state court sustaining the validity of the act under the state constitution is not reëxaminable here, nor was that decision against any title, right, privilege, or immunity specially set up or claimed by the petitioner under the Constitution of the United States.
>
> Treating it as involving an adjudication that the statute was not repugnant to the federal constitution, that conclusion was so plainly right that we should not be justified in allowing the writ upon the ground that error might have supervened therein."

In the case of

Moore vs. *Missouri*, 159 U. S. 677, *supra*,

it is stated:

> "It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that plaintiff in error was not twice put in jeopardy for the same offense, or that the increase of his punishment by reason of the commission of the first offense was not cruel and unusual. *In re Kemmler*, 136 U. S. 436. Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every person in like case with him, and convicted as he has been, would be subjected to the like punishment."

In the case of

Armour Packing Company vs. *Lacy*, 200 U. S. 226,

it is held that this court will not interfere with the conclusion expressed by the highest court of a state, that under the provisions of the state constitution a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.

It is there stated:

> "As to the contention that the act is in violation of section 3 of article V of the state constitution, the state supreme

> court held that this tax, although not a property or ad valorem tax, was controlled, even if the requirement of uniformity were applicable, by the rule that 'a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.' And with that conclusion it is not our province, nor are we disposed, to interfere."

In the decision of the Supreme Court of the State of California hereinbefore referred to many reasons are set forth in support of that portion of the decision holding that the statute of California does not have the effect of denying to all persons similarly situated the equal protection of the law. In the light of the language stated in the *Kemmler* and other cases last cited it would appear that the decision of the Supreme Court of California, is, indeed, worthy of careful consideration.

It is not proper to apply the term "arbitrary classification" in referring to such persons as are mentioned in the Habitual Criminal Acts, in cases where the accused has suffered a previous conviction of a public offense.

> *Moore* vs. *Missouri*, 159 U. S. 676 (burglary and previous conviction of grand larceny).

It is there stated:

> "The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself."

In *Barbier* vs. *Connolly, post*, it was well said that the provisions of the Constitution of the United States were "not designed to interfere with the

power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order." Neither is the statute of California subject to the objection that it provides for the infliction of cruel or unusual punishment. The infliction of the death penalty does not per se constitute a cruel and unusual punishment. The question whether or not punishment of death by the use of the electric current was a cruel and unusual punishment is well considered in

In re Kemmler, supra.

"As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the state to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. *Barbier* vs. *Connolly*, 113 U. S. 27, 31.

The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State and in the observance of those general rules prescribed by our system of jurisprudence; and the legislature of the State of

New York determined that it did not inflict cruel and unusual punishment and its courts have sustained that determination. We can not perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

In order to reverse the judgment of the highest court of the State of New York, we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that this we can not do upon the record before us."

There is no question of cruel and unusual punishment in this case. The punishment of death is not cruel within the meaning of that word as used in the Constitution. As was said by this court in the above case, which we have so often quoted from:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." (Page 447.)

Cruel and unusual punishment, as used in the Constitution of the United States and of this State, refers more to the manner and means of punishment than to the punishment itself, and, when used with reference to the death punishment, it means an adding to death itself of long torture or suffering, such as burning at the stake, crucifixion, breaking on the wheel, or the like. As was said in the case of

In re Storti (Mass.), 60 N. E. Rep. 210.

"Taking all the preliminaries most favorably for the prisoner, we are clearly of opinion that the Constitution

is not contravened by the act, and we render our opinion at once that we may avoid delaying the course of the law and raising false hopes in his mind. The answer to the whole argument which has been presented is that there is but a single punishment, death. It is not contended that if this is true the statute is invalid, but it is said that it is not true, and that you can not separate the means from the end in considering what the punishment is, any more when the means is a current of electricity than when it is a slow fire. We should have thought that the distinction was plain. In the latter case the means is adopted not solely for the purpose of accomplishing the end of death but for the purpose of causing other pain to the person concerned."

The provision in the Eighth Amendment of the United States Constitution contains no restriction on the powers of the State, but was intended to operate solely on the Federal Government.

Barron vs. *Baltimore*, 7 Peters, 243;
Pervear vs. *Commonwealth*, 5 Wall. 476

The first ten amendments to the Federal Constitution contain no restrictions on the power of the State, but were intended to operate solely on the Federal Government.

Brown vs. *New Jersey*, 175 U. S. 174;
Barron vs. *Baltimore*, *supra*:
Fox vs. *Ohio*, 5 How. 410;
Twitchell vs. *Commonwealth*, 7 Wall. 321;
United States vs. *Cruikshank*, 92 U. S. 542, 552;
Spies vs. *Illinois*, 123 U. S. 131;
In re Sawyer, 124 U. S. 200, 219;
Eilenbecker vs. *District Court of Plymouth Co.*, 134 U. S. 31;

Davis vs. *Texas,* 139 U. S. 651;
McElvaine vs. *Brush,* 142 U. S. 155;
Thorington vs. *Montgomery,* 147 U. S. 490;
Miller vs. *Texas,* 153 U. S. 535.

We must then look to our own Constitution for this inhibition upon cruel and unusual punishment. But our Supreme Court has held that this statute did not violate the provision of the State Constitution in reference to cruel and unusual punishment, and this court is bound by such decision. It was held in *Brown* vs. *New Jersey, supra,* "that the statutory provisions for a struck jury were not in conflict with the Constitution of New Jersey is for this court foreclosed by the decision of the higher court of the State."

Also, see

Louisiana vs. *Pillsbury,* 105 U. S. 278;
Hallinger vs. *Davis,* 146 U. S. 314, 319;
Forsyth vs. *Hammond,* 166 U. S. 506.

In

Smiley vs. *Kansas,* 196 U. S. 455,

it is said:

"It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. L., I. M. & St. P. Ry. Co.* vs. *Paul,* 173 U. S. 404, 408; *M., K. & T. Ry. Co.* vs. *McCann,* 174 U. S. 580, 586; *Tullis* vs. *L. E. & W. R. R. Co.,* 175 U. S. 348. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *United States* vs. *Reese,* 92 U. S. 214; *Trade-Mark Cases,* 100 U. S. 82; *United States* vs.

Harris, 106 U. S. 629, and *Baldwin* vs. *Franks*, 120 U. S. 678. We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the Chief Justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

In

West vs. *Louisiana*, 194 U. S. 261,

this court said:

"Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State, under circumstances such as those existing herein. Among many of the cases to that effect see *Brown* vs. *New Jersey*, 175 U. S. 172."

Armour Packing Co. vs. *Lacey, supra.*

Previous to the final decision of the case of defendant by the Supreme Court of the State of California consideration of the case, in and by proceeding of habeas corpus, was had by the District Court of Appeal of the State of California, in and for the Third Appellate District. In the decision of that case many reasons are clearly set forth why the act of the legislature of California does not present the case of a statute dealing with persons comprising a class arbitrarily selected. The decision of that case contains the following language:

In re Finley, 1 Cal. App. R. 202.

"It must be admitted that every person, *whether felon or freeman*, should be punished for making a deadly assault

on another. This, then, suggests an inquiry as to the punishment which could be inflicted on a guilty life convict, if the judgment of death be not permissible.

Through his own misconduct, such convict has forever forfeited his liberty and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached; and if this only remaining penalty can not be inflicted, then such convict stands immune from further human retribution.

The necessity for such punishment can not be questioned. So sweet is liberty that men will do and dare anything to gain it. And when a man has forfeited that liberty, when the song of every bird and the breath of every zephyr tells the tantalizing story of privileges forever lost, desperation and despair make the victim, especially if naturally depraved, a dangerous and daring man. Under such circumstances he will be careless of other lives and all consequences. It is then absolutely necessary that those who come in contact with him should be carefully protected against his reckless and certainly against his *malicious* and *deliberate acts*. But it was urged in argument that such convicts can be punished by solitary confinement, a diet of bread and water, and other penalties now in use as part of prison discipline. The obvious answer to this is, that every convict, whatever his term, is subject to such penalties for *ordinary* infractions of prison rules. This is an incident attaching to the judgment already pronounced against him. But when a life convict commits an act amounting to far more than a mere infraction of disciplinary rules, an act denounced as a grave and dangerous crime in every criminal code, for us to declare that such penalties are the only ones that can be decreed as punishment for such act, would be to say with deliberate solemnity that the law not only tolerates but should *command* an idle act."

As was said in the *Kemmler* case, we can not perceive that the State has abridged the privileges or immunities of the petitioner or deprived him of due process of law. He has had his day in court under

this statute providing for additional punishment, and was tried according to all the forms of law. Our own Supreme Court has pointed out in regard to the statutes providing for additional punishment for hardened offenders that by these statutes the protection of all the forms of law are thrown around the defendant.

In the case of

People vs. *Coleman,* 145 Cal. 613,

our Supreme Court said:

> "In *People* vs. *Sickels,* 156 N. Y. 548, it is said in the opinion of the court: 'Reason suggests that the persistent and hardened offender needs a severer punishment. The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and, being so, severer treatment is needed to compel him to reform his ways, and in furtherance of the effort to prevent crime. In enacting that, upon a conviction for a second offense, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right. How can it be said that the defendant has not had due process of law? The statute announced the enhanced penalty, which he would incur by repeating his infraction of the laws against crime. The indictment charged him with the aggravated crime, and he was put upon his trial, under the charge of being for a second time an offender, and, therefore, liable to suffer a severer punishment. His sentence was pronounced, after he had been tried and found guilty by the verdict of a jury. The course of the administration of justice was regular in all respects. When it is said that the presumption of the defendant's innocence was destroyed by the introduction of proof of his former conviction, the proposition is based upon mere assumption, and it is the error in that assumption which affects the appellant's argument. The statute has not abrogated the rule as to the presumption of innocence.'
>
> The scope and meaning of the fourteenth amendment to the constitution were considered *In re Kemmler,* 136 U. S.

436. The Supreme Court says in that case: 'The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.' (Citing a number of former decisions by the same court.) And again in *Leeper* vs. *Texas*, 139 U. S. 467, it is said: 'That by the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice, under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.' (Citing a number of cases.)

The defendant in this case, as appears from the record, was arraigned and tried in the same manner as any other defendant who has suffered a previous conviction is arraigned and tried, and therefore he was not discriminated against or deprived of due process of law, as shown by the decisions already cited and many others from the various states that might be cited to the same effect."

It is obvious that where one is undergoing imprisonment for life, and commits an assault of the character

mentioned in the statute, the punishment therein provided is the only one that can be effectually inflicted. A lesser degree of punishment would fall far short of satisfying the law and would, in reality, amount to no punishment at all. The statute applies equally to all persons embraced in the particular class mentioned therein. The classification is a necessary one, based upon inherent points of difference concerning the persons to be dealt with thereunder, and can not be termed arbitrary. It constitutes no mere placing of persons in classes in the same manner or degree that persons might be classed with reference to color, nationality, citizenship or by reference to similar qualities, and in no respect contravenes the provisions of the Constitution of California, or the Constitution of the United States.

In conclusion, it is to be observed that this writ of error is applied for under Section 709 of the Revised Statutes of the United States, which provides:

> "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or any authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under

such Constitution, treaty, statute, commission, or authority, may be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error."

It has been recently held, following the case of *Western Union Telegraph Co.* vs. *Ann Arbor Railroad Co.*, 178 U. S. 239, that the court upon application for a writ of error is not precluded by a mere claim of a federal question from an examination to ascertain whether jurisdiction can be maintained or not. But the claim must be real and substantial. A mere claim in words is not enough.

Memphis vs. *Cumberland Tel. & Tel. Co.*, vol. 31, Sup. Ct. Rep., p. 115, January 15, 1911.

It does not appear on this record by a statement in a logical form that this case is one which really and substantially involves a dispute or controversy as to a right which depends on the construction of the Constitution or some law of the United States. Therefore, this writ must be dismissed for want of jurisdiction.

Respectfully submitted.

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